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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 609

EMMA R. MOIST, etc., et al.,
Petitioners,

v.

BERNARD BELK, etc., et al.,
Respondents.

ANSWER TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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WO. 2-8745—WO. 2-8732

SUBJECT INDEX

	Page
I. Opinion Below	2
II. Jurisdictional Statement	2
III. Question Presented for Review	2
IV. Constitutional Provision and Statutes Involved	3
V. Statement	3-4
VI. Reasons for Denying Writ	4-6
Conclusion	7
Appendix B-1—Memorandum Opinion and Order Granting Motions to Dismiss and Motions for Summary Judgment	9-15
Appendix B-2—(Being Appendix "A" to Opinion of District Court)	15-17

INDEX OF AUTHORITIES

Cases

	Page
Crawford v. Zeitler (C.A. Ohio, 1964) 326 F.2d 119	5
Davis Trust Company v. Hardee, 66 App. D.C. 168; 85 F.2nd 571	6
Freedman v. Parklane Motors, Inc., 238 N.Y.S. 2nd 973, 976; 18A 2nd 262	4
Harvey v. Lewis, 357 Mich. 305, 98 N.W. 2nd 599	3
United States Fidelity and Guarantee Company v. McCarthy, 33 F.2d 7	4

Statutes

42 U.S.C.A. Sec. 1983	5
Sec. 1254 of Title 28 of the United States Code	2
Mich. CL '48 Par. 600.5805; M.S.A. 27A.5805	5

Texts

45 Am. Jur., Receivers Par. 385	6
30A, Amer. Jur., Judgments Sec. 844	6

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. .....

EMMA R. MOIST, individually and as assignee of Sidney M. Harvey and William T. McAlonan; LOUISE C. KUSHIGIAN, Administratrix of the Estate of Thermie K. Henkle, deceased; GEORGIANA S. WHITMAN, survivor of herself and Henry R. Whitman, deceased, and EVELYN M. SANDERS, Special Administratrix of the Estate of Muriel Miller, deceased,

Petitioners,

versus

BERNARD BELK, individually and as alleged "Receiver" of Brookdale Cemetery Association and Brpokdale, Inc., alleged Michigan corporations, GEORGE LEWIS, individually and as survivor of himself and Daniel Lewis and Saul Lewis, both deceased, formerly co-partners doing business as Lewis Brothers and as Lewis Bros., Inc., Lewis Brothers Memorial Chapel, Daniel Lewis & Brothers, Lewis Bros. Funeral Directors, Inc., and Mt. Sinai Memorial Cemetery Association, CHARLOTTE L. KLINE, Administratrix of the Estate of Saul Lewis, deceased, NAOMI V. HILSEN and RICHARD E. MANNING, successor administrators, duly appointed of the Estate of Daniel Lewis, deceased, BROOKDALE CEMETERY ASSOCIATION, an alleged Michigan Rural Cemetery Association, BROOKDALE, INCORPORATED, an alleged Michigan Profit corporation, CONSTANTINE A. TSANGADAS, JOHN R. STARRS, STANLEY E. BEATTIE, RALPH W. McKENNEY, SYDNEY LIST, DAPHNE LIST, JAMES M. WIENNER, Administrator of the Estate of Harris W. Wienner, deceased, and DEPARTMENT OF COMMERCE, formerly Corporation and Securities Commission, of the State of Michigan,

Respondents.

ANSWER TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

TO: The Honorable Earl Warren, Chief Justice of the Supreme Court of the United States, and the Associate Justices of the Supreme Court of the United States:

The Respondent, Bernard Belk, individually and as Receiver of Brookdale Cemetery Association and Brookdale, Inc., a Michigan corporation and the other named respondents herein respectfully pray that this Honorable Court deny the Petition for Writ of Certiorari filed herein to review a judgment and opinion of the Court of Appeals for the Sixth Circuit rendered in this cause on June 17th, 1967.

Your Respondents respectfully show:

I.

OPINION BELOW

Respondents agree with the statement contained in section I of the Petition for Writ of Certiorari.

II.

JURISDICTIONAL STATEMENT

The judgment of the Court of Appeals for the Sixth Circuit was rendered in this cause on June 17, 1967 and this Court has jurisdiction to review the same under Section 1254 of Title 28 of the United States Code.

III.

QUESTION PRESENTED FOR REVIEW

Was the Sixth Circuit Court of Appeals correct in dismissing the appeal as being frivolous?

IV.

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

Respondents agree with Paragraph IV. A and B contained in the Petition for Certiorari, but deny that any of the Statutes cited in Paragraph IV C are applicable.

V.

STATEMENT

Contrary to the statement of the Petitioners that "the following facts have not been denied," the Respondents have denied the conclusions and facts stated therein since 1952 and further assert that all issues raised therein have been litigated and decided by the Michigan Courts, more particularly in *Harvey v. Lewis* (1959), 357 Mich. 305, 98 NW 2nd 599. That case held that title to the Brookdale Cemetery was in a corporate entity and not in the plaintiffs, the Court saying "the legal title to the land in question, and the ownership thereof as against any claims of the plaintiffs, to be in Brookdale Cemetery Association and subject to the jurisdiction of the Court in the receivership proceeding." 357 Mich. at 314. As reported in the opinion of the Sixth Circuit Court of Appeals (Appendix A-1), the Michigan Court further decreed "that plaintiffs have no interest of any kind or description in said land and as an asset of the corporation, and that the rights of plaintiffs are limited to such as may be possessed by them as stockholders in Brookdale, Inc., or Brookdale Cemetery Association." Ibid. at 314.

On January 6th, 1966 the Wayne County Circuit Court ordered the cemetery sold (Appendix A, Petition for Writ

of Certiorari, pg. 34). On August 25, 1966, the Court of Appeals of the State of Michigan affirmed the action of the Circuit Court in ordering the sale of the cemetery (Appendix B, Petition for Writ of Certiorari, pg. 37).

Petitioners herein did not appeal the decision of the Michigan Court of Appeals to the Michigan Supreme Court, but instead, filed their complaint in the United States District Court, the dismissal of which is the subject matter before the Supreme Court of the United States in this petition for Writ of Certiorari. See Appendix B for opinion of the District Court. (Page 9 herein.)

VI.

REASONS FOR DENYING WRIT

The issue in this case is whether the Court of Appeals for the Sixth Circuit acted correctly in dismissing the appeal as being frivolous. The various Michigan courts have had this case before them since 1952 during which time the Petitioners herein did not raise the issue of violations of constitutional rights. Such issues are therefore *Res Judicata*. The concept of *Res Judicata* includes subsequent litigation as to all matters actually litigated and in addition thereto, matters which might have been litigated. *Freedman v. Parklane Motors, Inc.*, 238 N.Y.S. 2nd 973, 976; 18 A. 2nd 262. The case cited by Petitioners, *United States Fidelity and Guarantee Company v. McCarthy*, 33 F. 2nd 7 has no application to this case since *McCarthy* related to a situation where the facts in the second case were different from those of the first. The question in the *McCarthy* case was whether total disability under an insurance policy had been proved by the insured. The policy holder brought suit covering one specific period and after prevailing in the first litigation, brought suit a second time

to cover a subsequent period of alleged total disability. The Court held that the first case was *Res Judicata* only as to the first period and the second case, since evidence of non-disability could be submitted, must proceed to trial.

In the instant case, no allegations of wrong doing are alleged after the final disposition of the order confirming sale.

Petitioners have claimed violations of their rights under 42 U.S.C.A. Sec. 1983, which violations allegedly began in 1952. Accordingly their claims are barred by the Statute of Limitations. Since the Federal Civil Rights Act, 42 U.S.C.A. Sec. 1983 contains no statute of limitations, the Court must look to the applicable state statute, see *Crawford v. Zeitler* (C.A. Ohio, 1964) 326 F. 2nd 119. In Michigan, the Statute of Limitations in tort actions is three (3) years, CL '48 §600.5805; MSA 27A.5805. Thus, even if the matter is not *Res Judicata,* it cannot be litigated fifteen (15) years later.

The Petitioners admit at page 17 of the Petition that the only issue submitted to the Michigan Supreme Court was the action of the trial court in authorizing the sale of assets of Brookdale Cemetery Association, but Petitioners persist in attempting to thwart the order of sale by raising frivolous constitutional issues, which, even if meritorious should not delay the sale of land inasmuch as Petitioners would have the right to recover damages out of the proceeds of said sale. It should be emphasized, that the Michigan Courts ordered a sale of the cemetery and the Petitioners have raised no meritorious claims which should prevent such a sale. The Petitioners are parties in the action pending in the Michigan Courts and may make appropriate claims against the receivership assets once the cemetery has been sold and the proceeds paid over to the receiver to be held by him for ultimate distribution. Any

orders of the Michigan Trial Court relating to the distribution of receivership assets may be appropriately challenged by the Petitioners herein in the case presently pending in the Michigan Courts. Respondents do not acknowledge that the Petitioners have any such claims, but the effect of the Federal Court action in this matter has been to delay the sale of the cemetery where such action was ordered by the Michigan Courts and no appeal to the Michigan Supreme Court taken therefrom. Therefore, the sale should not be prevented under any circumstances, the Petitioners being possessed of all rights to challenge distribution of the proceeds of said sale.

The records submitted by Petitioners will show that the Petitions filed by the defendant, Harris W. Wienner was not filed as a judgment creditor's proceeding, but rather, was a petition to have the cemetery sold pursuant to a previous Court order requiring such a sale. In any receivership proceeding, assets may be sold to satisfy debts owed to creditors of the receivership. *Davis Trust Co. v. Hardee,* 66 App. D.C. 168; 85 F. 2nd 571. See 45 Am. Jur., Reveivers, §385.

The aforesaid sale was, as stated above, ordered by the Michigan Courts and Petitioners elected not to appeal from such order. Thus the order confirming sale has the effect of a final judgment which may not be collaterally attacked in the Federal Courts. See 30A. Am. Jur., judgments, Sec. 844.

CONCLUSION

Wherefore, Respondents respectfully pray that this Court deny the Petition for Writ of Certiorari and grant such other relief as to this Court may seem proper.

Dated this — of September, 1967.

Respectfully submitted,

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